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No. 88-196

IN THE

SUPREME COURT OF THE UNITED STATES

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==========

STATE OF FLORIDA,

Petitioner,

v.

WILLIE POTTS, JR.,

Respondent.

==========

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent, WILLIE POTTS, JR. by his undersigned counsel, asks leave to file his Response in Opposition to the Petition for Writ of Certiorari filed in this cause submitted herein without payment of costs and fees and to proceed in forma pauperis. Respondent's affidavit in support of this request is attached hereto.

This ____ day of August, 1988.

Respectfully Submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
9th Floor Governmental Center
West Palm Beach, Florida 33401
(407) 820-2150

BY _____
ANTHONY CALVELLO
Assistant Public Defender
Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to John Tiedemann, Assistant Attorney General, 111 Georgia Avenue, Elisha Newton Dimick Building, West Palm Beach, Florida, 33401, this ____ day of August, 1988.

_____
Of Counsel

No. 88-196

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

==========

STATE OF FLORIDA,

Petitioner,

vs.

WILLIE POTTS, JR.,

Respondent

==========

AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS

I, WILLIE POTTS, JR., being first duly sworn, depose and say that I am the respondent in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

I further swear that the responses which I have made to questions and instructions below are true.

1. Are you presently employed? Yes [ ] No [✓]

a. If the answer is "Yes", state the amount of your salary or wages per month, and give name and address of your employer:

b. If the answer is "No", state the date of last employment and the amount of the salary and wages per month which you received: Potts, Law Mart, Fla 82

2. Have you received within the past twelve months any money from any of the following sources?

a. Business, profession or from self employment?

Yes [ ] No [✓]

b. Rent payments, interest or dividends? Yes [ ] No [✓]

c. Pensions, annuities or life insurance payments?

Yes [ ] No [✓]

d. Gifts or inheritance? Yes [ ] No [✓]

e. Any other sources? Yes [ ] No [✓]

If the answer to any of the above is "yes", describe each source of money and state the amount received from each during the past twelve months. _____

_____

_____

3. Do you own cash, or do you have money in a checking or savings account? (Include any funds in prison accounts)

Yes [ ] No [✓]

If answer is "yes", state the total value of the items owned. _____

_____

_____

4. Do you own any real estate, stocks, bonds, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes [✓] No [ ]

If the answer is "yes" describe the property and state its approximate value. automobiles " Value ☐ 300..

_____

5. List the persons who are dependent upon your support, state your relationship to those persons and indicate how much you contribute toward their support: _____

_____

_____

I understand that a false statement to any questions in this affidavit will subject me to penalties for perjury.

"I declare under penalty of perjury that the foregoing is true and correct."

SIGNED on 5/3/88 Willie Potts Jr.

(Date) (Signature)

STATE OF FLORIDA)
)
COUNTY OF PALM BEACH)

WILLIE POTTS, being first duly sworn under oath, presents that he has read and subscribed to the above and states that the information therein is true and correct.

Willie Potts Jr.
Signature of Respondent

SUBSCRIBED and SWORN to before me this 3rd day of May, 1988.

NOTARY PUBLIC

My Commission Expires:

NO. 88-196

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

STATE OF FLORIDA,

Petitioner,

vs.

WILLIE POTTS, JR.,

Respondent.

ON PETITION FOR WRIT
OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
The Governmental Center/9th Floor
301 North Olive Avenue
West Palm Beach, Florida 33401
(407) 820-2150

ANTHONY CALVELLO
Assistant Public Defender

COUNSEL FOR RESPONDENT

QUESTION PRESENTED

Whether this Court Should Grant Certiorari and Review The Decision of the Florida Supreme Court On The Issue of Whether Section 775.-07(2), Florida Statutes (1985) is Constitutional When The Court's Opinion Was Based on Article I, Section Nine of the Florida Constitution

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CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 9 of the Florida Constitution (1968) provides in pertinent part:

> No person shall be deprived of life, liberty or property without due process of law....

STATUTORY PROVISION INVOLVED

Section 790.07(2), Florida Statutes (1985) provides:

> 790.07. Persons engaged in criminal offense, having weapons...
>
> (2) Whoever, while committing or attempting to commit any felony or while under indictment, display, uses, threatens, or attempts to use any firearm or carries a concealed firearm is guilty of a felony of the second degree, punishable as provided in § 775.082, § 775.083, and § 775.084.

COUNTERSTATEMENT OF THE CASE AND FACTS

The Florida Supreme Court in State v. Potts, 13 F.L.W. 353 (Fla. June 2, 1988) affirmed and adopted the holding of the lower Florida appellate court, State v. Potts, 13 F.L.W. 78 (Fla. 4th DCA Dec. 30, 1987) which held a Florida state statute, section 790.07(2), Florida Statutes, (1985)[1] unconstitutional on its face. The Florida appellate court held:

> Although we agree with the state that there is a legitimate interest in protecting the health and safety of the public, we do not agree that criminalizing the status of being "under indictment" is a reasonably related means to achieve the intended end. Therefore, despite the rule that every presumption is to be indulged in favor of the validity of a statute when considering its constitutionality, Griffin v. State, 396 So.2d 152 (Fla. 1981), we conclude that the portions of section 790.07 which prohibit certain activities "while under indictment" are unconstitutional as violative of substantive due process.

Respondent relies on the statement of the case and facts as found by the Florida courts in Potts.

---

[1] Section 790.07(2), F.S. (1985) provides:

> 790.07. Persons engaged in criminal offense, having weapons...
>
> (2) Whoever, while committing or attempting to commit any felony or while under indictment, display, uses, threatens, or attempts to use any firearm or carries a concealed firearm is guilty of a felony of the second degree, punishable as provided in § 775.082, § 775.083, and § 775.084. [Emphasis added]

REASONS FOR DENYING THE WRIT

THE FLORIDA SUPREME COURT AND LOWER FLORIDA APPELLATE COURT BASED ITS HOLDINGS UPON THE FLORIDA CONSTITUTION AND FLORIDA LAW

The critical question before the Court in regard to the petition for writ of certiorari is whether there is any legal basis for a grant of certiorari. It is strenuously submitted that none of the criteria listed under Rule 17 of the Court have been met. Quite simply, this case does not concern a federal question. This case was resolved on the basis of Florida state law and the Florida Constitution, specifically Article I, Section 9, the Florida due process clause.

Petitioner argues that the Court should grant certiorari because "the Florida Supreme Court's decision in State v. Potts, conflicts with the Sixth Circuit's decision in United States v. Craven [478 F.2d 1329 (6th Cir. 1973), cert. denied, 414 U.S. 866 (1973)] on the federal constitutional question of whether enhanced sanctions may be imposed upon indictees for firearm violations under the due process clause." Petitioner's Petition at 9. Respondent disagrees.

Petitioner's argument ignores or overlooks the fact that the Potts decision was decided on independent State grounds namely the due process clause of the Florida Constitution, Article I, Section 9. The Florida courts did not cite the Fourteenth Amendment or federal cases. Rather they specifically relied on Florida state court decisions.

The Florida Due Process Clause has been held to have broader application than the federal clause. In State v. Glosson, 462 So.2d 1082 (Fla. 1988), the Florida Supreme Court rejected the narrow application of the due process defense found in federal cases and expressly held the the particular governmental misconduct involved violated the Florida due process clause, Article I, Section 9 of the Florida Constitution (1968). Thus in Glosson, the Florida Supreme Court expressly held that a broader interpretation of the State's due process clause was warranted.

It is well-settled historically that this Court will not grant review where there exists adequate State grounds to support the action of the State court. Brown v. Union Pac. R. Co., 267 U.S. 255, 259 (1925). It has also been held that the "Court will decline to review State court judgments which rest on independent and adequate State grounds, notwithstanding the co-presence of federal grounds." Faye v. Noia, 372 U.S. 391, 428 (1963). In Michigan v. Long, 463 U.S. 1032, 1041, 103 S.Ct. 3469, 3476 (1983) this Court stated that if the decision of the State court "indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." Hence on this basis review should be denied.

Even assuming arguendo, that the Potts decision was somehow incorrectly decided by the Florida Supreme Court, there is absolutely no compelling reason for this Court to grant review. The Florida Supreme Court has unanimously stated that a Florida statute is unconstitutional. The Florida Supreme Court has not decided a federal question in a way in conflict with the decision of a federal court of appeals. See Rule 17.1(b). Further, Petitioner has failed to articulate any important or compelling reason to grant certiorari in this cause. Hence the petition for a writ of certiorari should be denied.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

RICHARD L. JORANDBY
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The Governmental Center/9th Floor
301 North Olive Avenue
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ANTHONY CALVELLO
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to John Tiedemann, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida, 33401 by courier this 31st day of August, 1988.

Of Counsel